Supreme Court,
F I L E
JUL 9 19
OFFICE OF THE C

No. 90-1897

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

UNITED ARTISTS COMMUNICATIONS, INC.,
Petitioner,

VS.

THE MOVIE 1 & 2,
a general partnership,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

FRANCIS O. SCARPULLA
The Alcoa Building
1 Maritime Plaza, Suite 1040
San Francisco, CA 94111
Telephone: (415) 788-7210
Attorney for Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864-2300

QUESTION PRESENTED FOR REVIEW

Respondent respectfully suggests that the Court of Appeals' decision raises no questions that merit certiorari review.

TABLE OF CONTENTS

	Page
Statement Of The Case	1
Prior Resolution of a Related Certiorari Petition	1
Procedural Background; Record Before the Court of Appeals; The Court of Appeals' Opinion	2
Summary Of The Argument	2
The "Split" Agreement	2
The Sherman 2 Claims	2
Argument	3
I. There Was Sufficient Evidence of Monopolization, Attempt to Monopolize and Conspiracy to Monopolize to Warrant a Jury Trial	3
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Page

The Movie 1 & 2 v. United Artists Communications, Inc., 909 F.2d 1245 (9th Cir. 1990), *amended* (July 25, 1990), *hearing denied* (March 14, 1991), *reversing* 681 F. Supp. 654 (N.D. Cal. 1987) ..... *passim*

Paramount Pictures Corporation v. The Movie 1 & 2, Dkt. No. 90-1593 ..... *passim*

Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, ____ U.S. ____, 110 S.Ct. 768 (1990) 2

United States v. Grinnell Corp. (1966) 384 U.S. 563 3

Pacific Coast Agricultural Export Association v. Sunkist Growers Inc. (9 Cir. 1975) 526 F.2d 1196, 1204, *cert. denied* (1976) 425 U.S. 959 4

Statutes

Title 15, United States Code, Section 2 ..... *passim*

No. 90-1897

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

UNITED ARTISTS COMMUNICATIONS, INC.,
Petitioner,

VS.

THE MOVIE 1 & 2,
a general partnership,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondent respectfully suggests that this Court should deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in *The Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245 (9th Cir. 1990), *amended* (July 25, 1990), *rehearing denied* (March 14, 1991), reversing 681 F.Supp. 654 (N.D. Cal. 1987).

STATEMENT OF THE CASE

Prior Resolution of A Related Certiorari Petition.

All defendants, except defendant/petitioner United Artists Communications, Inc. ("United Artists"), filed a petition for *certiorari* in this Court on April 16, 1991, which, in part, raised a

similar issue as that raised by issue No. 1 in this petition. See *Paramount Pictures Corporation v. The Movie 1 & 2*, Dkt. No. 90-1593. On June 24, 1991, this Court denied that petition. *Id.* The same result should attend here.

Procedural Background; Record Before the Court of Appeals; The Court of Appeals' Opinion.

Plaintiff/respondent has already set forth, in detail, the procedural history of this case, along with a recitation of the factual record before the Court of Appeals, as well as an analysis of the appellate decision below. *Id.*, Dkt. No. 90-1593, Brief in Opposition, pp. 2-7. Therefore, plaintiff will not repeat any of its prior discussions except as they may be directly relevant to the one remaining new issue raised by this second petition in this action.

SUMMARY OF ARGUMENT

The "Split" Agreement.

Both the prior petition, Dkt, No. 90-1593, and this petition challenge the Ninth Circuit's application of the *per se* rule in a group boycott action. As plaintiff argued in its opposing brief in Dkt. No. 90-1593, the Ninth Circuit's opinion is consistent with those cases in the Seventh Circuit, cited by petitioners in 90-1593 and by petitioner here, which hold that a group boycott is *per se* illegal if the purpose of the boycott is also *per se* illegal. Here, the Ninth Circuit found that the purpose of the group boycott was itself *per se* illegal, 909 F.2d, at 1253. Thus, this opinion is in complete agreement with the Seventh Circuit's opinions cited by United Artists, as well as this Court's recent group boycott opinion, *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, ____ U.S. ____, 110 S.Ct. 768, 782, fn. 19 (1990). Thus, this second petition for certiorari should be denied.

The Sherman 2 Claims.

United Artists argues that the Ninth Circuit refused to consider defendant's assertion that it could not exert any "market power" where there were no barriers to entry and where this defendant did not control the market's "productive assets." However, petitioner did not offer conclusive evidence on "barriers to entry" or

on what the "productive assets" are in this market, and therefore failed in its summary judgment burden.[1]

Thus, all the Ninth Circuit held was that, given the evidence produced by the plaintiff, there were jury issues as to whether the exhibitor defendants, including United Artists, violated Section 2 of the Sherman Act.

ARGUMENT

I

There Was Sufficient Evidence of Monopolization, Attempt to Monopolize and Conspiracy to Monopolize to Warrant a Jury Trial

Petitioner erroneously argues that the opinion below creates a conflict with Seventh Circuit, Sherman 2 authorities. See Petition at pp. 14-19. There is, in fact, no such conflict.

In *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 570-71, this Court stated that a Sherman 2 monopolization requires two elements:

> The possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

There is little dispute over the relevant geographic market in this case—*i.e.*, the so-called "Santa Cruz zone." C.R. 213, Ex. G, p. 54; C.R. 208. Furthermore, there is little dispute that the relevant product market is the exhibition of first-run films. C.R. 225, pp. 10-11; C.R. 179, p. 31.

Plaintiff offered evidence of the market shares of the defendant exhibitors in the local Santa Cruz market, along with plaintiff and one other small exhibitor. United Artists dominated the market in

---

[1] Of course, one of the "productive assets" in this market are the theatres themselves, which United Artists does control in the Santa Cruz market.

gross exhibition revenues and in the commercial film market, as the following tables demonstrate:

Overall First-Run Market

Exhibitor	Gross Exhibition Revenues	Percentage
United Artists	$6,326,303.00	89.6%
Nickelodeon	493,646.00	7.0%
Scotts Valley	180,901.00	2.6%
The Movie 1 & 2	58,939.00	0.8%
Total	$7,059,789.00	100.00%

Commercial First-Run Market

Exhibitor	Gross Exhibition Revenues	Percentage
United Artists	$6,159,665.00	96.9%
Nickelodeon	-0-	0.0%
Scotts Valley	180,901.00	2.9%
The Movie 1 & 2	13,004.00	0.2%
Total	$6,353,570.00	100.00%

In contrast to the commercial market, the Nickelodeon dominates the art film sub-market:

Art First-Run Market

Exhibitor	Gross Exhibition Revenues	Percentage
United Artists	$166,658.00	23.6%
Nickelodeon	493,646.00	69.9%
Scotts Valley	-0-	0.0%
The Movie 1 & 2	45,935.00	6.5%
Total	$706,239.00	100.00%

See, C.R. 212, 225.

The existence of monopoly power may be inferred from a predominant share of the market. Market share is the single most important factor in determining the existence of monopoly power. *Pacific Coast Agricultural Export Association vs. Sunkist Growers*

Inc. (9 Cir. 1975) 526 F.2d 1196, 1204, *cert. denied* (1976) 425 U.S. 959. United Artists' market share was over 89.6% for the relevant time period of this action for the entire first-run market and as high as 96.9% for the commercial film market. The Nickelodeon controlled as much as 69.9% of the local art-film market during the same time span; together, United Artists and Nickelodeon enjoyed 93.5% of this market. These facts alone demonstrate monopoly power sufficiently to let the case go to a jury on this issue.

However, evidence of United Artists' market power was not limited to a market-share analysis. For example, the national average for film rental was 58 to 60% for first-run films. C.R. 208. While the national average is 58 to 60%, in the Santa Cruz market, that average drops to about 53%, illustrating the monopoly power of the defendant exhibitors. See, C.R. 198 and 212.

Moreover, there was ample additional evidence regarding United Artists' power in the market. For example, United Artists' district manager in Santa Cruz, Mr. Papovich, admitted that his company takes whatever film it wants in Santa Cruz and The Movie gets what is left over. C.R. 213. The Paramount branch-office booker in San Francisco also told plaintiff that "U.A. controls the market in Santa Cruz and that's the way it works." C.R. 213. The former manager of the United Artists' Del Mar Theater told plaintiff that United Artists' president had been to Santa Cruz and said United Artists would have to get rid of plaintiff because that independent exhibitor could create problems for United Artists. C.R. 213.

The fact that United Artists controls about 3,000 screens nationwide and is the largest exhibitor-circuit in the country illustrates the problem. Carl Smiley, a film buyer, who has been in the industry for over 25 years, observed that United Artists was so large and seemed to have such a control over the distribution companies that, in his opinion, this defendant was able to accomplish whatever it might want in Santa Cruz. C.R. 213, 225.

Plaintiff also offered evidence that United Artists acquired Kindair, its competitor and partner in an earlier "split agreement," ostensively to prevent another competitor from entering

that market. C.R. 182, 183, Ex. 4; 212-214, Exs. A, H; 225; E.R. 183-189.

Finally, plaintiff offered evidence that United Artists had 12 screens in the Santa Cruz market—i.e., 63.2% of the market—and that combined, petitioner and Nickelodeon had 17 of the 19 screens in Santa Cruz—i.e., 89.4% of that market. Plaintiff also offered evidence that United Artists collected 96.9% of the gross revenue from commerical films in this market and therefor controls the "productive assets" in Santa Cruz.

CONCLUSION

Contrary to petitioner's assertions, the Ninth Circuit's opinion below does not conflict with the cited opinions of the Seventh Circuit or with any of this Court's Sherman 2 decisions.

For the foregoing reasons, respondent respectfully requests this Court to deny the petition for *certiorari*.

Respectfully submitted,

FRANCIS O. SCARPULLA
The Alcoa Building
1 Maritime Plaza, Suite 1040
San Francisco, CA 94111
Telephone: (415) 788-7210
Attorney for Respondent